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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-519

EDGAR FRANKEL, Petitioner,
v.
AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

EDGAR FRANKEL
133 West 15 Street
New York City, N.Y. 10011

Petitioner, pro se

November 1, 1974

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TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

As a merchant seaman and as a ward of the Admiralty, the petitioner, pro se, EDGAR FRANKEL, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York and opinion entered in this proceeding on June 6, 1974.

OPINION BELOW

The opinion of the Appellate Term-First Dept., Supreme Court of the State of New York, and the dissenting opinion, appear in the Appendix hereto. (P. A-4) The affirmation of the Court of Appeals of the State of New York and judgment of courts below also appear in the Appendix hereto. The case was unofficially reported in the New York Law Journal.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on June 6, 1974. A timely petition for an extension of time in which to file this petition for a writ of certiorari was granted by the Supreme Court of the United States on August 29, 1974 (No. A-108). The extension

of time was granted to and including November 1, 1974, and this petition is filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257 (3).

QUESTIONS PRESENTED

1. Is a merchant seaman, so seriously injured in an on-the-job accident that he is no longer able to follow his previous occupation, entitled to "maintenance and cure" payments (the seamen's equivalent of workmen's compensation) while undergoing vocational rehabilitation ordered by physicians of the United States Public Helath Service Hospital, so that he can become a functional human being?

2. Does the Occupational Safety and

Health Act of 1970, 29 U.S.C. 651 constitute a mandate to the circuit courts and to the Supreme Court to adjust the definition of "maximum cure"? What is "maximum cure"?

3. Does the Shipowners' Liability Convention of 1936 include Vocational Rehabilitation as part of maximum cure?

4. Did the New York state appellate courts violate Amendment 7 of the United States Constitution by reversing a jury's unanimous maintenance and cure decision which had been decided on the facts, and at the same dismissing the merchant seaman's complaint?

STATUTORY PROVISIONS INVOLVED

A. The general maritime law and decisions of various circuit courts and of the Supreme Court of the United States with reference thereto.

B. Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

C. Constitution of the United States, Amendment 7.

D. Shipowners' Liability Convention of 1936, which became effective as United States law as of September 29, 1939. (54 Stat. 1693, 1697)

Pertinent excerpts from the above appear in the Appendix attached hereto, pages A-15 through A-18.

STATEMENT OF THE CASE

Edgar Frankel, the merchant seaman in this case, was injured in mid-Atlantic ocean aboard the S.S. Container Forwarder, owned by American Export Isbrandtsen Lines, Inc.

On June 22, 1971, the United States Public Health Service Hospital determined that as a result of his injuries, Mr. Frankel would no longer be able to perform the work of his previous occupation.

The Hospital ordered Mr. Frankel to undergo Vocational Rehabilitation so that he could become a functional human being, while continuing to return to the Hospital for out-patient treatment.

The shipowner cut off maintenance for Mr. Frankel on the grounds that the seaman had been "cured" and additionally that Vocational Rehabilitation was not a part of cure.

A six man jury unanimously ruled, on the testimony of three doctors, that Mr. Frankel had not reached maximum cure at date of trial, and awarded the seaman maintenance and cure to date of trial.

The Shipowner appealed to the Appellate Term of the New York State Supreme Court. A two to one majority reversed the jury's unanimous verdict, and at the same time dismissed the complaint.

The majority Opinion stated:

"...The facts are that he is left with the stumps and residual pain." (P.A-6)

"That he may need Vocational Rehabilitation does not entitle him to maintenance and cure." (Opinion, A-6)

The complaint was dismissed, and the seaman was ordered to pay $30. costs to the shipowner. (A-6)

The questions of what constitutes "maximum cure", and Vocational Rehabilitation as a part of maximum cure, were raised at the original jury trial, and on all subsequent appeals.

A few pertinent pages from the trial record appear in the Appendix, Pages A-19 through A-22, and are discussed beginning on Page 18 of this Petition.

REASONS FOR GRANTING THE WRIT

1. THERE IS AN IRRECONCILABLE CONFLICT BETWEEN DECISIONS OF FEDERAL COURTS OF APPEALS AS TO THE DEFINITION OF AND APPLICATION OF "MAXIMUM CURE" FOR MERCHANT SEAMEN.

2. THERE IS ALSO A CONFLICT BETWEEN FEDERAL COURTS AND THE HIGHEST COURT OF THE STATE OF NEW YORK ON A FEDERAL QUESTION OF SUBSTANCE.

The Third Circuit, in Neff v. Dravo Corp., 407 F. 2d 228, 235 (3rd Cir.-1969) states:

> "In this day of rapid change in the field of medicine and surgery, when miracle drugs are daily advancing man's life expectancy, and longevity is increasing, the connotation of "cure" must be considered a continuous process. At least in cases where as here, the medication is allegedly necessary to arrest what would otherwise be a deteriorating condition, we think it may be of a sufficiently curative nature to be encompassed within the doctrine of maintenance and cure...."

The Court of Appeals for the Second Circuit specifically rejects the views of the Third Circuit. In Berke v. Lehigh Marine Disposal Corp., 435 F.2d 1073, 1076, (2nd Cir.-1970), the Court states:

"...We point out that we are aware that the Third Circuit has recently expanded the definition of "cure" to include those situations where, as here, the plaintiff could receive out-patient palliative treatment... and that we have not overlooked that decision."

The Fifth Circuit's views were expressed by Judge Skelly Wright in Scott v. Lykes Bros. Steamship Co., 152 F. Supp. 104. Judge Wright wrote that maximum cure is reached

"...when, through the application of modern methods of rehabilitation under medical supervision, the seaman is returned, as near as may be, to the status of a functional human being."

Thus, maintenance and cure may be paid on one side of a river, but not on the opposite side, by the same steamship company, as in the second and third circuits.

There is a sharp conflict and a lack of harmony and uniformity in the circuits as to what constitutes "maximum cure" in the light of present day conditions.

The New York State appellate courts have even completely obliterated the term "maximum cure", and have invented a term "maximum medical benefits" (See , Appendix to this petition P.A-5). The New York State appellate court even goes on to state:

> "That he may need Vocational Rehabilitation does not entitle him to maintenance and cure." (Opinion P.A-6).

This state court opinion on a question of substance which is clearly Federal, was made completely without support of law or case law. The above statements threaten the health of thousands of seamen, and are in conflict with the views of Federal Courts of Appeals.

3. A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THE SUPREME COURT OF THE UNITED STATES.

(a) A STATE COURT HAS UNILATERALLY ABROGATED THE RIGHTS OF MERCHANT SEAMEN BY DECLARING "THAT HE MAY NEED VOCATIONAL REHABILITATION DOES NOT ENTITLE HIM TO MAINTENANCE AND CURE."

A diligent search of state and federal cases, and of decisions of foreign maritime nations, shows that no court in history has ever made the statement made in the Opinion in this case - "That he may need Vocational Rehabilitation does not entitle him to maintenance and cure." (Opinion -A- 6).

The state court had no authority to impose upon the general maritime law such a doctrine, which has no support in law or case law.

Given the fact that the maritime industry is a consumer of hands, eyes, arms and legs, in what is one

of this nation's ten most dangerous industries, this question is of supreme importance to all merchant seamen and their families.

4. (a) THE PASSAGE OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 29 U.S.C. 651, CONSTITUTES A CLEAR MANDATE FOR A REDEFINITION OF "MAXIMUM CURE".

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651, states in pertinent part:

> "651. Congressional statements of findings and declaration of purpose and policy.
>
> (a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage

loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several states and with foreign nations and to provide for the general welfare to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.-

****

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience."

(Emphasis Supplied)

This preamble or preface to

"OSHA" clearly applies to all employed persons.

American admiralty courts have from the earliest times since the founding of the Republic exercised their inherent powers to adjust American general substantive maritime law to new conditions by a process of development and elaboration.

Under an analagous federal statute, the Longshoremen's and Harbor Worker's Compensation Act, 33 USC 901, 908g, compensation payments are made for Vocational Rehabilitation:

> "908(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation, and who under the direction

of the Secretary as provided by section 939(c) of this title is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance..."

4. (b) THE MEANING OF AN INTERNATIONAL TREATY IS IN QUESTION; IT IS A QUESTION OF GREAT IMPORTANCE TO ALL MERCHANT SEAMEN, WHO ARE WARDS OF THE ADMIRALTY.

The Shipowners' Liability Convention of 1936, which became effective as United States law as of September 29, 1939, states in pertinent part:

"ARTICLE 5.
1. Where the sickness or injury results in <u>incapacity for work</u> the shipowner shall be liable-
(a) .....
(b) if the sick or injured person has dependants, to pay wages in whole or in part as prescribed by national laws or regulations from the time when he is landed until he has been cured or the sickness or <u>INCAPACITY</u> has been declared of a permanent character."
.....(emphasis supplied) (54 Stat. 1693,1697)

(Full quotation in Appendix, P. A-17)

This means that the seaman is to be considered cured when THE CAPACITY TO WORK IS RESTORED, if that is possible.

The New York State court opinion reads: "That he may need vocational rehabilitation does not entitle him to maintenance and cure." (Appendix P.A-6)

Obviously, the very purpose of vocational rehabilitation is to RESTORE THE CAPACITY TO WORK.

The New York State court's opinion is therefore in violation of a United States Treaty, and should be reviewed by the Supreme Court of the United States.

5. IT IS WORTHY OF THE SUPREME COURT'S ATTENTION THAT A SERIOUS EROSION OF THE SEVENTH AMENDMENT IS TAKING PLACE IN THE APPELLATE COURTS OF THE STATE OF NEW YORK. JURY DECISIONS ON THE FACTS ARE REVERSED, AND CASES DISMISSED WITHOUT REGARD FOR CONSTITUTIONAL JURY PREROGATIVES.

Let us examine the appellate court's treatment of the facts in relation to the record:

The defendant-shipowner requested the court to charge the jury as follows: (R 231) (Appendix P. A- 21)

(The jury was present)

"MR. FLEMING: I request your Honor to charge: That it is well settled that a seaman's right to maintenance and cure extends to the point where maximum cure has been obtained and this point must be determined by reference to all the facts in the particular case. (emphasis supplied)

THE COURT: I so charge.

This was a concession and admission by the defendant that the plaintiff-seaman had introduced evidence which presented issues of fact for resolution by the jury.

Another concession and admission by the defendant that the plaintiff had introduced evidence which

presented issues of fact for resolution by the jury appears in the Record, Pg. 230 (Appendix, P.A-20):

MR. FLEMING: I also request your Honor to charge: The important fact to be examined is did plaintiff reach maximum medical recovery? Subsequent treatment for the easing of pain does not affect the finding that maximum medical recovery was obtained. (emphasis supplied).

THE COURT: I so charge. (Plaintiff objected to this charge at R 231) (Appendix P. A- 21)

At the conclusion of the charge to the jury, and as part of the charge to the jury, the court asked the attorneys for both parties (R 229):

(COURT) "Any exceptions"?

Mr. Cohen: (Plaintiff's Attorney) "No exceptions."

Mr. Fleming: (Defendant's Attorney) "No exceptions, your Honor."

The jury, given the specific charge to resolve the facts of the nature of the pain, and having heard 3 doctors, decided unanimously for the plaintiff-seaman, and was upheld by the presiding trial judge. The appellate court's majority, however, also reversed on the facts, for their opinion reads: (R 256 Opinion) (Appendix P. A-6)

> "...the facts are that he sustained an amputation of parts of two fingers in 1969, that he is left with the stumps and residual pain, but there is no proof that medical care would be of further benefit. Judgment reversed, with $30 costs and complaint dis-

missed.:

Once the appellate court recited its alternate version of the facts - that the pain was merely "residual", perhaps it might reverse the unanimous jury verdict, if it wished to, but it could not at the same time dismiss the complaint.

The facts of the nature and degree of the pain based upon the testimony of the three doctors was clearly a question for the jury, based upon the evidence presented, and so conceded and admitted by the defendant in its own request to charge the jury(supra).

The appellate court's reversal of the jury decision and dismissal of the complaint represents a serious and continuing erosion of the Seventh Amendment in the appellate courts of the State of New York.

STATEMENT OF INTENTION

If a suitable Admiralty attorney who practices before the Supreme Court of the United States is found, he will be retained for the appeal, rather than it being prosecuted pro se.

I respectfully state to the Court that although I am not an attorney, I have made a careful home study of Admiralty law, particularly during my convalescence and rehabilitation, and I believe I am well qualified to present this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals of the State of New York.

Respectfully submitted,

Edgar Frankel

133 West 15 St.

New York City, N.Y.
10011

Petitioner, pro se
as merchant seaman
and ward of the
Admiralty

November 1, 1974

APPENDIX

JUDGMENT entered the 22nd day of November, 1971.

The summons and complaint in this action having been served on AMERICAN EXPORT ISBRANDTSEN LINES, INC., the defendant herein on the day of , 1971 and the judgment rendered in favor of plaintiff against said defendant after trial by Jury at Trial Term, Part 47, on the 18th day of November, 1971

NOW, ON MOTION OF KLEIN AND STERLING, attorneys for the plaintiff it is,

ADJUDGED that EDGAR FRANKEL, plaintiff, residing at 15 State St., New York City 10004, do recover of AMERICAN EXPORT ISBRANDTSEN LINES, INC., defendant, residing at 26 Broadway, New York, N. Y. the sum of $2,889.60 with interest of $ making a total of $2,889.70 with $170.00 costs and disbursements, amounting in all to the sum of $3,059.60 and that the plaintiff have executed therefor; fifteen (15) days stay.

s/HOWARD F. TYSON Clerk

APPENDIX

At an Appellate Term of the Supreme Court, First Department, held at the Court House, Borough of Manhattan, City of New York, on the 22nd day of May, 1972

Present: HON: SAMUEL M. GOLD
(dissenting in)Justice
(part)Presiding
" PETER A. QUINN
" VINCENT A. LUPIANO
Justices

(Same Title)

An appeal having been taken to this court by defendant from a judgment of the Civil Court of the City of New York County of New York entered on the 22nd day of November, 1971, and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED, that the judgment so appealed from be and the same is hereby reversed, with $30 costs and complaint dismissed.

Enter,

s/ S.M.G.
Justice Appellate Term
Supreme Court, First Dept.

FILED
MAY 23, 1972
NEW YORK CO. CLERK'S OFFICE

APPENDIX

OPINION

FRANKEL, plf.-res. v. AMERICAN EXPORT ISBRANDTSEN LINES, INC. def.-app. - Plaintiff, an officer's messman, who sustained an amputation of parts of two fingers in an accident at sea on Oct. 6, 1969, and received maintenance and cure from the defendant shipowner until July 7, 1971, has recovered a judgment for maintenance and cure until the date of trial, for damages for withholding same and for counsel fee. We reverse.

A shipowner's liability for maintenance and cure continues until the seaman reaches maximum medical recovery (Farrell v. U. S. 336 U. S. 511; Desmond v. U. S. 217 F.2d 948,

950 cert. den. 349 U. S. 911; Vaughan v. Atkinson 369 U. S. 527, 531; Berke v. Lehigh Marine Disposal Corp. 435 F.2d 1073). In this record, there is no evidence that further medical care would be of benefit in curing his condition. While his physician stated his conclusion that the plaintiff had not attained maximum medical benefits, there was no evidence as to the further curative medical care suggested. His testimony that the plaintiff needs vocational rehabilitation "not medical" is of no help to the plaintiff. There is no proof that plaintiff is in a medical rehabilitation program (cf. Scott v. Lykes Brcs. S.S. Co. 152 F. Supp. 104) or that

he is undergoing curative treatment while receiving vocational training (cf. Bradt v. U. S. 221 F.2d 325). That he may need vocational rehabilitation does not entitle him to maintenance and cure. Giving the plaintiff the advantage of every favorable inference which may properly be drawn from the evidence, the facts are that he sustained an amputation of parts of two fingers in 1969, that he is left with the stumps and residual pain, but there is no proof that medical care would be of further benefit.

Judgment reversed, with $30 costs and complaint dismissed.

APPENDIX

OPINION

Quinn and Lupiano, JJ. concur. Gold, J. dissents in part in following dissenting memorandum.

I believe that the judgment should be reduced, not reversed, in its entirety.

Since there was no evidence from which the jury could infer callous indifference or recalcitrance in defendant's discontinuance of the maintenance and cure payments, the trial judge should have dismissed plaintiff's claim for damages, for withholding such payments and for counsel fee.

However, the evidence did present an issue of fact for resolution by the jury on the claim for maintenance and cure for the limited period from

July 7, 1971, to the date of trial, a period of about four months. It is proposed that the verdict be reduced to $1,064, the jury's award for that period at the $8 per day rate.

The obligation of shipowners to provide a seaman with food, lodging and medical care when he becomes sick or injured in a ship's service is of ancient origin under the maritime law. "The duty was historically imposed in order to alleviate the physical and financial hardships which otherwise would have beset a sick or injured seaman put ashore, perhaps in a foreign port, without means of support, or hope of obtaining medical care" (Vaughan v. Atkinson, 369 U. S.

527, 535). When there are ambiguities or doubts, they are resolved in favor of the seaman (Warren v. United States, 340 U. S. 523).

When the doctor at the U. S. Public Health Service Hospital determined that plaintiff had attained maximum medical benefit, he notified the Coast Guard that plaintiff was permanently unfit for duty as a seaman and referred plaintiff to the N.Y. State Division of Vocational Rehabilitation "so that he could become a productive member of our society." Although there was a difference of opinion between the doctors testifying on behalf of the respective parties as to the

matter of degree and impact, the evidence was sufficient to support the implicit finding by the jury that plaintiff was then under such disability of finger sensitivity resulting from nerve involvement at the stumps of two of his fingers as to incapacitate him from comparable employment. During the four month period plaintiff was given at the Division a medical examination, including hand and nerve conduction tests, in addition to the usual vocational aptitude testing, and thereafter participated in a program, whose purpose was, as plaintiff testified, "to improve the physical condition of my fingers and, in addition, to train me for other kinds

of work." During this period plaintiff also continued to attend at the hospital clinic, where it was noted on Sept. 10, 1971, that his "finger sensibility is not decreasing" and on Oct. 1, 1971 that "home care program of warm soaks and massage" has been recommended.

There was, therefore, a basis in the evidence for a finding that, for the limited period of four months, plaintiff required this medically-approved rehabilitation program to control his finger sensitivity and adjust to a different type of job.

The judgment should be modified by reducing it to the sum of $1,064 with interest and costs thereon.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 22, 1973.

Present - Hon. Owen McGivern, Justice
Emilio Nunez Presiding
Theodore R. Kupferman,
Francis T. Murphy, Jr.,
George Tilzer Justices

Edgar Frankel,
Plaintiff-Appellant,

-against- 6492

American Export Isbrandtsen Lines, Inc.,
Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant,

from the order of the Appellate Term of the Supreme Court, First Department, entered on May 23, 1972, reversing the judgment of the Civil Court of the City of New York, New York County, entered on November 22, 1971, and dismissing the complaint,

and said appeal having been argued by Mr. Max Cohen of counsel for the appellant, and by Mr. Joseph V. Fleming of counsel for the respondent; and due deliberation having been had thereon,

It is ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements, on the majority opinion at Appellate Term. (Nunez, J., dissents, in part, and would modify in accordance with the dissenting memorandum of Gold, J., at Appellate Term.

ENTER:

Joseph J. Lucchi
Deputy Clerk

Filed February 22, 1973

STATE OF NEW YORK

COURT OF APPEALS

Decisions

JUNE 6, 1974

CASES

1	No. 275 73	Order affirmed with costs and disbursements to plaintiff-appellant (see Berke v. Lehigh Mar. Disposal Corp., 435 F.2d 1073 (1970). All concur.
Edgar Frankel, Appellant, vs. American Export Isbrandtsen Lines, Inc., Respondent.		

APPENDIX

STATUTORY PROVISIONS INVOLVED

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651:

"651. Congressional statements of findings and declaration of purpose and policy.

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several states and with foreign nations and to provide for the general welfare to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."-*******

APPENDIX

STATUTORY PROVISIONS INVOLVED

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 -

> (7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience."
> (Emphasis Supplied)

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APPENDIX

STATUTORY PROVISIONS INVOLVED

Convention between the United States of America and other members of the International Labor Organization respecting shipowners' liability in case of sickness, injury, or death of seamen. Adopted by the General Conference of the International Labor Organization, twenty-first session, Geneva, October 24, 1936; ratification advised by the Senate of the United States, subject to understandings, June 13, 1938; ratified by the President of the United States, subject to the said understandings, August 15, 1938; ratification of the United States of America registered with the Secretary-General of the League of Nations October 29, 1938; proclaimed by the President of the United States September 29, 1939. October 21, U.S.A.

****

ARTICLE 5.

1. Lorsque la maladie ou l'accident entraîne une incapacité de travail, l'armateur doit payer:

a) tant que le malade ou le blessé demeure à bord, la totalité du salaire;

b) à partir du débarquement, si le malade ou le blessé a des charges de famille, la totalité ou une partie du salaire selon les prescriptions de la législation nationale, jusqu'à guérison ou jusqu'à constatation du caractère permanent de la maladie ou de l'incapacité.

ARTICLE 5.

1. Where the sickness or injury results in incapacity for work the shipowner shall be liable— Incapacity for

(a) to pay full wages as long as the sick or injured person remains on board;

(b) if the sick or injured person has dependants, to pay wages in whole or in part as prescribed by national laws or regulations from the time when he is landed until he has been cured or the sickness or incapacity has been declared of a permanent character.

(54 Stat. 1693, 1697)

APPENDIX

STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment 7 :

"AMENDMENT VII-CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

the mere fact plintiff continued making periodic visits to the U.S. Public Health Service Hospital does not entitle him to payment of maintenance. Visits must be for the purpose of receiving treatment directed toward improving his condition.

THE COURT: I so charge.

MR. FLEMING: I request your Honor to charge: That it is well settled that a seaman's right to maintenance and cure extends to the point where maximum cure has been obtained and this point must be determined by reference to all the facts in the particular case.

THE COURT: I so charge.

MR. FLEMING: I request the Court to charge: That plaintiff is entitled to recover counsel fees for maintenance and cure only if the ship owner was callous, arbitrary and unreasonable in its denial of maintenance payment; the mere fact that defendant, acting in good faith erroneously denied plaintiff maintenance is insufficent to support an award for counsel fees.

THE COURT: I so charge.

MR. COHEN: I respectfully except to all the additional requests to charge except

damages without maintenance and cure, and I think under the law--

THE COURT: You are right in that contention.

MR. FLEMING: On vocational training, your Honor, I would advise the jury it is entirely independent of this action. Mr. Frankel is currently enrolled in the New York State Education Department training program. That is completely independent of this lawsuit. He is enrolled; he is receiving training. It has no bearing on this lawsuit. He was referred to that program; he is currently enrolled. He is entitled to receive training. This lawsuit would have no effect on his rights under the New York Education Department.

THE COURT: If they found here that he was not entitled to maintenance and cure, that would not interfere with his enrolment in vocational training?

MR. FLEMING: No, sir, that is our position.

MR. COHEN: My position is the effect of not having the money would make any

Supreme Court of the United States
OCTOBER TERM, 1974

NOV 27 1974
MICHAEL RODAK, JR.

No. 74-519

EDGAR FRANKEL,

Petitioner.

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

BRIEF OF RESPONDENT, AMERICAN EXPORT ISBRANDTSEN LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-519

EDGAR FRANKEL,

Petitioner.

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

BRIEF OF RESPONDENT, AMERICAN EXPORT ISBRANDTSEN LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Is a seaman entitled to the payment of maintenance beyond the date on which he attained maximum benefit of medical care?

2. Do the Appellate Courts of the State of New York have the power to reverse a judgment based on a jury verdict where there was no evidence to support the jury's verdict?

STATEMENT OF THE CASE

Petitioner, while serving as a messman on the s/s Container Forwarder, a vessel owned by Respondent, suffered a traumatic amputation of the tips of two fingers of his right hand on October 6, 1969 when a cabin door closed in severe weather.

On October 9, 1969, petitioner was admitted as an inpatient at the United States Public Health Service Hospital on Staten Island for treatment of his injuries. He was discharged to outpatient status on October 29, 1969.

Petitioner then visited the hospital on an outpatient basis for evaluation at approximately 8 week intervals throughout 1970 and into 1971. During this period, petitioner was soaking his fingers at home.

On June 22, 1971, plaintiff was examined and his status evaluated by the Chief of Orthopedic Services at the hospital. Based on his examination and review of petitioner's records, the Chief of Orthopedic Services concluded that plaintiff had achieved maximum medical benefit of medical care. (R-142)

On the trial of the action, this doctor testified that the fact that plaintiff was still soaking his fingers and rubbing them did not constitute active medical care (R-145). He further testified that petitioner had attained the maximum benefit of medical care and that no improvement in plaintiff's fingers was anticipated. (R-146).

The doctor called by respondent as an expert medical witness testified that he had examined plaintiff on July 7, 1971 and had concluded that petitioner had obtained a status quo and that no further treatment was indicated. (R-85-86). He also testified that while soaking the fingers after an amputation would assist in softening the scar and had

clinical value, once such a procedure had been carried out for a year and a half, it was worthless and would do nothing for the patient. (R-87). The doctor who testified on petitioner's behalf conceded that petitioner required "vocational assurance; that he was not talking about medfical rehabilitation". (R-192).

On the trial, the petitioner testified that he was not receiving schooling and was not in any vocational rehabilitation program. (R-58).

Following a four day trial, the jury awarded plaintiff a verdict and judgment was entered. Respondent appealed to the Appellate Term, First Department, Supreme Court of the State of New York, which reversed the jury's verdict and dismissed the complaint. In its opinion (Petitioner's Appendix A-4 through A-6), the Court held that there had been no evidence presented that further medical care would be of any benefit to the petitioner in improving his condition. The court also held that petitioner's medical expert's testimony concerning vocational rehabilitation was of no help to petitioner on the issue of maximum medical benefit.

The decision of the Appellate Term was affirmed by the Appellate Division, First Department, and by the Court of Appeals of the State of New York.

REASONS FOR DENYING THE WRIT

POINT I

A SEAMAN IS NOT ENTITLED TO THE PAYMENT OF MAINTENANCE AFTER HE HAS REACHED MAXIMUM BENEFIT OF MEDICAL CARE.

The New York Court of Appeals, in affirming the decision of the First Department of the Appellate Division,

cited *Berke v. Lehigh Marine Disposal Corp.*, 435 F.2d 1073 (2 Cir. 1970). In that decision, the Circuit Court held that a seaman was not entitled to maintenance beyond the time when he had attained maximum benefit of medical care.

That decision was based squarely on decisions of this Court which were set forth in Footnote No. 3 on page 1076 which reads in part as follows:

> "A seaman is not entitled to cure past the point at which his condition cannot be further improved. Farrell v. United States, 336 U.S. F.11 69 S.Ct. 707, 93 L.Ed. 850 (1949); Fitzgerald v. United States Lines Company, 374 U.S. 16, 19, 83 S.Ct. 1646, 10 L.Ed. 2d 720 N. 7 - - -."

Petitioner cites *Neff v. Dravo Corp.*, 407 F.2d 228 (3rd Cir. 1969), to suggest a conflict in the decisions of the Circuit Courts. That Court was very careful to set out at page 235 the following caveat:

> "Accordingly, in the light of the facts of *this record*, we hold the claim here to be embraced within the connotation of 'cure' as used in the phrase 'maintenance and cure'. (Emphasis ours)"

There was medical testimony on the trial of the *Neff* case that the plaintiff needed medical attention. The Court said at page 233: [redacted]

> " ' . . . *Nor is he entitled to maintenance and cure if he is not sufficiently ill or disabled as to make advisable some kind of medical attention.*' [Emphasis ours.] This, in effect, maintains he is entitled to maintenance and cure when in need of medical attention."

In the instant case, there was absolutely no proof that even the *Neff* criterion, "some kind of medical attention,"

would benefit the petitioner. It is therefore clear, on the record of this case, that petitioner having completely failed to prove the need for medical attention on the trial, does not meet the requirements of the *Neff* case cited in his brief as the basis for "an irreconciable conflict" between the Circuits as to when maintenance is payable.

With respect to petitioner's claim that the possibility of vocational rehabilitation requires the payment of maintenance, it should be pointed out that petitioner has presented a moot question to this Court and the Courts below, since on the trial of the action, he testified that he was in no actual program and was not receiving schooling (R-58).

Even if the question were not moot, there is absolutely no case law in support of petitioner's theory that maintenance is payable solely because a seaman is in vocational retraining.

Nor does *Scott v. Lykes Bros. Steamship Co.*, 152 F.Supp. 104 support petitioner's position. The plaintiff in that case was awarded additional maintenance after a truly astounding improvement in his physical condition following a period of additional medical therapy.

As this Court pointed out in *Farrell v. United States, et al.*, 336 U.S. 511 (1949) at page 519:

> "maintenance and cure is more certain if more limited in its benefits."

To require a shipowner to pay maintenance to a seaman undergoing vocational retraining would be a "distortion of the doctrine of maintenance and cure" warned against by this Court in *Farrell, supra*, p. 519.

POINT II

THE STATUTORY PROVISIONS CITED BY THE PETITIONER ARE INAPPLICABLE TO THE LAW OF MAINTENANCE AND CURE.

Petitioner argues in his brief that the Occupational Safety and Health Act of 1970 (29 U.S.C. 651) constitutes a mandate to the Courts to revise the law of maintenance and cure.

However, the Congress itself very explicitly stated that the Act was not to have that effect:

> "§653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected
>
> * * *
>
> (b) . . .
>
> (4) Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

In like manner, §902(3) of the Longshoreman and Harbor Workers Compensation Act, 33 U.S.C. 901, specifically excludes that statute's application to "a master or member of a crew of any vessels".

POINT III

A STATE APPELLATE COURT CAN REVERSE A JUDGMENT BASED ON A JURY VERDICT AND DISMISS THE COMPLAINT WHEN THE EVIDENCE ADDUCED ON THE TRIAL WAS WHOLLY INSUFFICIENT AS A MATTER OF LAW.

In its opinion (R-255) the Appellate Term concluded that there was no evidence in the record that further medical care would be of benefit in curing petitioner's condition. In so doing, it gave petitioner the advantage of every favorable inference which could be drawn from the evidence.

The Court acted under the authority of New York State CPLR 5522* and in accordance with the New York Court of Appeals holding in *Blum v. Fresh Grown Preserve Corp.*, 292 N.Y. 241, 245:

> ". . . Thus, the question whether a verdict of a jury is 'unsupported by sufficient evidence' is always one of law for the Trial Judge. He *must* set aside such a verdict. (Getty v. Williams Silver Co., 221 N.Y. 34). The court is justified in directing a verdict in such case 'not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to

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*New York State Civil Practice Law and Rules, Rule 5522:

"Disposition of appeal.

A court to which an appeal is taken may reverse, affirm, or modify, wholly or in part, any judgment or order before it, as to any party. The court shall render a final determination or, where necessary or proper, remit to another court for further proceedings. A court reversing or modifying a judgment or order without opinion shall briefly state the grounds of its decision."

recover." (*McDonald v. Metropolitan St. Ry. Co.*, 167 N.Y. 66, 70.)

"The courts below have not mistaken their power. They have found that by no rational process could the trier of the facts base a finding in favor of the defendant upon the evidence here presented. This court has frequently pointed out that 'insufficient evidence is, in the eye of the law, no evidence.' "

See also, *B. Millens & Sons Inc. v. Vladich*, 23 N.Y. 2d 998 (1969) in which the New York Court of Appeals affirmed an order of the Appellate Division which reversed a judgment based on a jury verdict and dismissed a complaint on the ground that there was no proof.

Recognizing the power of the Federal Courts to grant judgment not withstanding the verdict, this Court in *Galloway v. United States*, 319 U.S. 372, 389 (1943) observed:

"If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is that the contention has been foreclosed by decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Rules of Civil Procedure. Cf. Rule 50, . . ."

This Court went on to point out (p. 390) "The jury was not absolute master of fact in 1791." In assessing the criteria for a directed verdict or judgment n.o.v. the Court stressed at p. 395:

"the essential requirement is that mere speculation be not allowed to do duty for probative facts."

Neely v. Eby Construction Co., 386 U.S. 317 (1967) acknowledges the power of a Federal Court of Appeals to

grant judgment n.o.v. where this has been denied in the trial court. See also *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935). The Court in *Neely* noted that even where the Court of Appeals had denied such a motion, it had reversed and granted it (p. 326).

As to the competing relief of a new trial, the Court said (p. 326) "Such a rule (mandating a new trial) would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary re-trials."

With particular application to the case at bar, we might return to the decision of *Galloway v. United States*, 319 U.S. 372, 392-393:

> "On the other hand, there is equal room for disbelieving it (Seventh Amendment) compels endless repetition of litigation and unlimited chance, by education gained at the opposing parties expense, for perfecting a case at other trials."

See also *New York, New Haven & Hartford Railroad Company v. Henagan*, 364 U.S. 441 (1960); *United States v. Generes*, 405 U.S. 93, 106 (1972).

Dismissal of a complaint because of a complete failure of proof does not violate the Seventh Amendment.

CONCLUSION

THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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